No. 87-998

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

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CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

—o—

**ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

—o—

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION

—o—

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BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief amicus curiae on behalf of its members.[1]

[1] MSLF has obtained the written consent of the Appellee. The Appellant has given its oral consent, and its written consent shall be filed with the Clerk of the Court immediately upon its receipt by amicus.

INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation's members many of whom include public and private employers, many of which have affirmative action plans. MSLF has an extensive background and expertise in civil rights litigation.[2]

The Foundation and its members are deeply concerned about any further erosion of the limits on affirmative action programs instituted by state and local governmental entities. Affirmative action programs are constitutionally permissible only because of our country's unfortunate history of discrimination. These programs must be closely tied to such discrimination and, consequently, have some reasonable and easily discernable limiting principles under the Fourteenth Amendment. The Fourth Circuit Court of Appeals' ruling correctly identifies this Court's decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267

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[2] MSLF was counsel of record in both *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara County*, — U.S. —, 107 S. Ct. 1442, 94 L.Ed. 2d 615 (1987). In addition, The Foundation has participated as counsel or amicus in many cases defining the scope and application of the Civil Rights Acts and the Fourteenth Amendment. *E.g., Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985), *vacated and remanded*, — U.S. —, 106 S. Ct. 2240, 90 L.Ed.2d 688 (1986); *NAACP v. City of Detroit*, 591 F. Supp. 1194 (E.D. Mich. 1984), *reversed and remanded*, 821 F.2d 328 (6th Cir. 1987); *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F. 2d 1401 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987).

(1986) as providing those limiting principles, and has properly applied it.

The *Wygant* decision's importance is twofold. First, it finds any racial classification to be subject to strict scrutiny. This standard applies whether the purported justification is beneficent or not, as the Fourteenth Amendment makes no such distinction. Second, *Wygant* requires the state or local governmental entity creating the plan to make findings of its own discriminatory conduct. In other words, the actor seeking to use a racial preference for remedial purposes, may do so only to remedy its *own* past misconduct. These requirements prevent affirmative action plans from being used in ways which are not consistent with their purpose; that is, to eradicate past discrimination.

MSLF and its members urge this Court to affirm the Fourth Circuit's decision, and hold that the *Wygant* strict scrutiny standard applies to affirmative action programs created by state and local governments.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus curiae adopts the statement of the case and the statement of the facts as set out in the Appellee's Brief.

SUMMARY OF ARGUMENT

In this case, the Foundation seeks to prevent this nation's civil rights law from being twisted into a blank check for special entitlements and partisan politics. The Fourteenth Amendment requires limiting principles to be placed on affirmative action programs.

As recognized by earlier decisions of this Court, most notably *Wygant*, racial preferences and classifications are always subject to "strict scrutiny" review. This is the case whether the classification disadvantages a group which has been traditionally discriminated against or not. To be upheld, such classifications must be necessary in order to achieve a compelling governmental interest.

While the eradication of discrimination is such an interest, mere racial balance in a given industry or sector of society is not. Therefore, this Court has imposed a requirement of "findings" upon state and local governmental entities seeking to use racial criteria in the award of public benefits, goods, or services. The entity creating the program must identify, by convincing evidence, its own past misconduct. Any findings Congress may have made are inadequate to ensure that such discrimination has occurred locally. Furthermore, the use of congressional findings may lead to anomalous or unjust situations, such as the one before this Court, where the relative benefits and burdens between individuals are readjusted without any regard for past circumstances.

Many state and local governmental entities throughout the country have adopted equally onerous and oppres-

sive affirmative action plans, equally devoid of concrete findings or any other defensible basis. The problem is widespread, and shows no signs of abating. The instant case involves a program indicative of those adopted nationwide, suffering from the same deficiencies as those identified by this Court in *Wygant*.[3] The ordinance is not narrowly tailored to the achievement of a compelling governmental interest. As such, this case presents this Court with an opportunity to confirm that these principles are applicable to every state and local governmental entity which takes it upon itself to make distinctions amongst its citizens on the basis of their race and sex.

It is essential that this Court make clear that affirmative action plans in this country are limited to those circumstances which justify their existence. If naked racial preferences based upon nothing more than political expedience are permissible, then the integrity which should be the hallmark of the nation's civil rights laws shall be little more than a hollow word, engendering not praise, but scorn and contempt.

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[3] The "Report of the Minority Business Legal Defense and Education Fund on Minority Business Enterprise Programs of State and Local Governments," indicates that at least 192 state and local governments have affirmative action plans. The Report is available from the Academy for State and Local Government, 444 North Capitol Street, N.W., Suite 349, Washington, D.C. 20001.

ARGUMENT

I. THE APPROPRIATE STANDARD OF REVIEW FOR AFFIRMATIVE ACTION PROGRAMS IS THE "STRICT SCRUTINY" RULE ARTICULATED BY THIS COURT IN WYGANT v. JACKSON BOARD OF EDUCATION

The Fourteenth Amendment prohibits invidious discrimination on the basis of race, by state and local governments.[4] "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986), *quoting, University of California Regents v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J., concurring).[5] "The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant*, 476 U.S. at 273, *citing, Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), *Bakke*, 438 U.S. at 291-299, and *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

In reconsidering this case on remand, the Fourth Circuit Court of Appeals found the Richmond plan to be invalid under the Equal Protection Clause of the Fourteenth

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[4] "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, sec. 1.

[5] Although acts which discriminate on the basis of sex are not subject to quite as strict a scrutiny as those based on race, this Court has recognized that "the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification." *Kirchberg v. Feenstra*, 450 U. S. 455, 461 (1981).

Amendment. The Court of Appeals correctly noted that, "[t]he very infirmities which marked the preferential provision in *Wygant* are present in this case." *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1357 (4th Cir. 1987), *prob. juris. noted*, — U.S. —, 108 S. Ct. 1010, 98 L.Ed.2d 976 (Feb. 22, 1988).[6] This case is the most recent of a long line of cases which this Court has used to define the parameters of permissible affirmative action programs. The most elusive objective has, until recently, been that of formulating a workable and reasonable limiting principle for affirmative action programs. In *Wygant*, this Court articulated such a principle.

> The plurality opinion by Justice Powell held that:
>
> (a) In the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored;
>
> (b) Societal discrimination alone is insufficient to justify a racial classification; and,
>
> (c) If the purpose is to remedy prior discrimination, to be constitutionally valid there must be a factual determination that there is a strong basis in evidence for the conclusion that remedial action is necessary.

These limiting principles are both sensible and practical. And it is with this yardstick that any government-imposed affirmative action plan must be evaluated.

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[6] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), concerned a collective bargaining agreement between the Board and the teachers' union, which immunized minority teachers from layoffs. Although layoffs were governed by seniority, this was qualified by a provision stating that at no time could there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In addition, the percentage minority teachers had to equal the percentage of minority students. As a result, non-minority teachers with less seniority were retained.

II. THE PROGRAM MUST BE NARROWLY TAILORED TO THE ACHIEVEMENT OF A COMPELLING GOVERNMENTAL INTEREST

This "strict scrutiny" standard has two prongs, both of which must be met, if the governmental action is to be sustained. Government-created affirmative action programs "must be justified by a compelling governmental interest," and the means must be "narrowly tailored to the achievement of that goal." *Wygant*, 476 U.S. at 274. Thus, though this scrutiny is "not 'strict in theory and fatal in fact,'" *Bakke*, 438 U.S. 362 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment and dissenting in part), it is nonetheless so stringent as to demand that no race-based preference may be sustained without a justification of the highest order. Such a justification is entirely lacking in this case.

"Discrimination or segregation for its own sake is not, of course, a constitutionally permissable purpose." *In re Griffiths*, 413 U.S. 717, 721 n.8 (1973) (citation omitted). More specifically, "quotas merely to attain racial balance are forbidden." *United States v. Wood, Wire and Metal Lathers International Union, Local Union No. 46*, 471 F.2d 408, 413 (2d Cir. 1973). The same principle applies to quotas based upon sex.[7] While the end to racial

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[7] "Where, as here, the state's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the state cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the state appears to redound, if only indirectly, to the benefit of those without need for special solicitude." *Orr v. Orr*, 440 U.S. 268, 283 (1979).

discrimination is a recognized justification, there is absolutely no showing as to the specific nature and extent of such discrimination for which a remedy is needed. Rather, the only discernible governmental interest appears to be the political benefits to be reaped from the set aside program. This falls far short of the "compelling interest" required by the Constitution.

III. THE CITY MUST MAKE FINDINGS OF ITS OWN PAST DISCRIMINATION PRIOR TO INSTITUTING ANY AFFIRMATIVE ACTION PROGRAM

To demonstrate the presence of a compelling interest, "the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274. This Court "never has held that societal discrimination alone is sufficient to justify a racial classification." *Id.* This is because, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

The requirement of findings is not a formal or technical one. It serves as a limiting principle, and also makes sure that the alleged discrimination is tangible and concrete. A state or local government "must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.* at 277. Here, the City put forward no evidence of any kind, let alone evidence that the non-minority contractors or subcontractors against whom the quotas will operate

have been guilty of discriminatory practices. This complete failure to attempt to constitutionally justify its actions must raise serious doubts as to the City's true motives in adopting the plan.

The necessity of particularized findings by the governmental entity is also extremely sound from a public policy perspective. It prevents state and local governments from seeking to use these programs as a means of giving special entitlements to certain key constituencies. It defeats ill-conceived or improper attempts to attack entire industries, such as construction contractors, on the basis of generalized charges of "discrimination." The Courts of Appeals have found this rule to be extremely practical, and have used it in every such program reviewed but one since the *Wygant* decision was issued.[8]

The rule does not create a situation where a private party must incriminate himself before affirmative action plans may be instituted. If a government wishes to redress discrimination on the part of one or more private parties, the civil and criminal provisions of the Civil Rights Acts have, over the years, proven equal to the task. If the government is concerned about its *own* past or present misconduct, it must address that wrongdoing with

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[8] *J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986); *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), *prob. juris. noted*, — U.S. —, 108 S. Ct. 1010, 98 L.Ed.2d 976 (Feb. 22, 1988) (No. 87-998); *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3806 (May 11, 1988) (No. 87-1860). The sole exception is *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3462 (Nov. 23, 1987) (No. 87-1001).

a program which puts the primary burden upon itself, the illegal actor, and be narrowly tailored to minimize the imposition upon innocent third parties.

Without this requirement, whole segments of the society may be indicted and convicted of discrimination *in absentia*, as was the case here. The City Council concluded there had been rampant discrimination in the construction industry, and imposed a judicial-type remedy without any prior notice to contractors, or the taking of any evidence from them. The imposition of judicial remedies without proper judicial process is extremely offensive to the principles of American government and concordant democratic values.

The City cannot impose minority participation "goals" or other forms of race/gender preferences, without a finding of the City's own culpability. Judicial remedies are the only avenue available if the City wishes to redress any perceived wrongdoing on the part of the contracting industry as a whole, or a substantial number of individual contractors. Though it may be difficult to create a "bright line" rule as to how findings are to be made, and when they are sufficient, this is no different from the sort of evidentiary assessments which the courts are called upon to make every day. Furthermore, in this case, *no* attempt to make adequate findings was made, and the possibility of difficult cases in the future ought not deter this Court from firmly rejecting a program which is completely devoid of constitutional justification. There have been no findings, and in their absence the race/gender provisions of the program violate the Fourteenth Amendment.

Race and gender preferences, such as those in the present case, are never constitutionally permissible when they are transparently designed to assure certain preferred groups a hypothetical share of public moneys. Furthermore, the only possible basis of this program is the rejected concept of "societal discrimination." A generalized conclusion about societal discrimination lacks the specificity necessary to demonstrate a compelling state interest in excluding nonminority subcontractors from the majority of contracts solely on the basis of race and sex.

Because there have been no findings of intentional discrimination, no compelling state interest arises. Therefore, the ordinance violates the Equal Protection Clause of the Fourteenth Amendment. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976). With no findings, the City cannot claim that the ordinance is a remedy. It therefore becomes, on its face, an arbitrary and capricious race and sex-based action constituting an equal protection violation.

IV. NATIONAL FINDINGS MADE BY CONGRESS CANNOT SUFFICE TO JUSTIFY AFFIRMATIVE ACTION PROGRAMS BY STATE AND LOCAL GOVERNMENTS

Even assuming that the national findings made by Congress over a decade ago in the passage of the Public Works Employment Act (PWEA) retain any validity, they are inadequate to justify state and local governmental affirmative action plans. In *Fullilove v. Klutznick*, 448 U.S. 448 (1977), the Supreme Court upheld the PWEA as constitutional, but Justice Powell cautioned, "[t]he degree of specificity required in the findings of discrimination

and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body." *Id.* at 515-516 n.14 (Powell, J., concurring).

The City cannot rely upon whatever minimal findings Congress made when it enacted the PWEA over a decade ago. The findings of societal discrimination underlying Congress' enactments reflect an assessment of a *national* program, based upon the country taken as a whole. It does not follow, logically or otherwise, that those findings as to the nation's generalized condition are equally applicable in a specific locality such as Richmond. "In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276. The City has an affirmative obligation to determine for itself the permissibility of this sort of racial classification. Congress has not relieved state and local governments of their constitutional obligations, nor can it do so.

This is underscored by the *Wygant* decision's rejection of "societal discrimination" as a basis of any government-imposed affirmative action plan. The Court of Appeals in its second decision in this case said it best:

> National findings do not alone establish the need for action in a particular locality. If they did, the *Wygant* Court's rejection of societal discrimination would be undercut. For a locality to show that it enacted a racial preference as a remedial measure, it must have had a firm basis for believing that such action was required based upon prior discrimination by the locality itself. . . . Localities cannot disregard the line between remedial measures and political transfers by adopting the *Fullilove* program as though it were boilerplate.

Croson, 822 F.2d at 1359-1360.

It is essential that state and local governments be held accountable for their discriminatory racial classifications. "[A] municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." *Id.* at 1357. Furthermore, the nation's civil rights laws should not be permitted to be used as a thinly-veiled excuse for a new political spoils system:

> "If this plan is held to be valid, then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based upon the politics of race. It is precisely to guard against this latter abuse that the *Wygant* requirement of particularized findings is essential.

Id. at 1357-1358.[9]

The Fourth Circuit expressed it best when it succintly stated, "[i]f this plan is supported by a compelling governmental interest, then so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.* at 1360. It is this slippery slope with which this Court is currently confronted.

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[9] "Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups." *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1361 (4th Cir. 1987), *quoting Wygant*, 476 U.S. at 284 n.13. "A record of prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races." *Id.* at 1361. Again, specific findings, constituting a firm basis, are the prerequisite for this type of program.

CONCLUSION

The limiting principles articulated by this Court in *Wygant* are a workable and reasonable way to determine the parameters of permissible affirmative action plans. Without such limits, affirmative action will become a farce, recognized as little more than a politically expedient redistribution of wealth under the guise of eradicating discrimination. MSLF and its members urge this Court to ensure the continued viability of affirmative action in the United States, by affirming the decision of the Court of Appeals.

> [N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.[10]

Dated this 8th day of June, 1988.

Respectfully submitted,

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10 *The Federalist, No. 78* (A. Hamilton).